

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,
8 Plaintiff-Respondent,

NO: 2:13-CR-0125-TOR-2
2:17-CV-0440-TOR

9 v.

10 OMAR ALARCON FUENTES,

ORDER DENYING POST-REMAND
HABEAS CORPUS PETITION
PURSUANT TO 28 U.S.C. § 2255

11 Defendant-Petitioner.

12 BEFORE THE COURT are Petitioner's Renew[ed] Motion Post-Remand
13 for Habeas Corpus Pursuant to 28 U.S.C. § 2255 and to Appoint Counsel (ECF No.
14 262) and Motion To Either Set a Briefing Schedule or For Sua Sponte Ruling on
15 Petitioner's Renew[ed] Motion Post-Remand for Habeas Corpus Pursuant to 28
16 U.S.C. § 2255 and to Appoint Counsel (ECF No. 265). The motions were
17 submitted for consideration without oral argument. The Court—having reviewed
18 the motions, the completed briefing, and the record and files therein—is fully
19 informed.

20 //

ORDER DENYING POST-REMAND
HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 1

1 **BACKGROUND**

2 A jury convicted Petitioner of knowingly distributing over 50 grams of
3 methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii).
4 Petitioner was sentenced and he appealed his conviction. While the direct appeal
5 was pending, Petitioner filed a pro se motion under 28 U.S.C. § 2255. ECF No.
6 236. The Ninth Circuit issued a memorandum disposition affirming Petitioner's
7 conviction. See ECF No. 248. The Ninth Circuit declined to consider Petitioner's
8 ineffective assistance of counsel argument on direct review, *id.* at 4, explaining that
9 neither extraordinary exception to the general rule applied, leaving the issue for
10 collateral review.

11 This Court then issued an Order denying Petitioner's pending motion under
12 28 U.S.C. § 2255. ECF No. 251. Petitioner appealed and the Ninth Circuit ruled
13 that it was improper for this Court to consider the § 2255 motion while the direct
14 appeal was pending. ECF No. 258. The Ninth Circuit vacated this Court's
15 decision and remanded with instructions to dismiss the § 2255 motion without
16 prejudice. *Id.* This Court did so. ECF No. 261. Thereafter, Petitioner renewed
17 his § 2255. ECF No. 262. After this Court ordered a briefing schedule, ECF No.
18 264, Petitioner filed a motion for a briefing schedule and to appoint counsel, ECF
19 No. 265. Petitioner's motion for a briefing schedule is denied as moot.

20 //

ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 2

1 **I. Evidentiary Hearing**

2 The issues raised do not require an evidentiary hearing. *See* Rule 8, Rules
3 Governing Section 2255 Proceedings. The transcripts, records and materials filed
4 in this proceeding adequately document the issues for resolution. These issues do
5 not involve a material factual dispute that need be resolved. *United States v.*
6 *Andrade-Larrios*, 39 F.3d 986, 991 (9th Cir. 1994) (“The district judge acted
7 within his discretion in denying an evidentiary hearing on the § 2255 motion
8 because the files and records conclusively showed that the movant was not entitled
9 to relief.”).

10 **II. Appointment of Counsel**

11 The court may appoint counsel for an indigent habeas petitioner if the court
12 determines that the interests of justice so require. 18 U.S.C. § 3006A(a)(2)(B).
13 The appointment of counsel is discretionary unless the court conducts an
14 evidentiary hearing on the petition. *See* Rule 8(c), Rules Governing Section 2255
15 Proceedings. Here, no evidentiary hearing is required, the issues raised are fully
16 briefed and are so insubstantial as to not require the appointment of counsel.

17 **III. Ineffective Assistance of Counsel**

18 The Sixth Amendment to the Constitution provides that criminal defendants
19 “shall enjoy the right to have the assistance of counsel for his defense.” U.S.
20 Const. amend. VI. Effective assistance of counsel is analyzed pursuant to the

1 doctrine set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). According to
2 *Strickland*, Petitioner bears the burden of establishing two components to an
3 ineffectiveness inquiry. First, the representation must fall “below an objective
4 standard of reasonableness.” 466 U.S. at 687–88. Courts scrutinizing the
5 reasonableness of an attorney’s conduct must examine counsel’s “overall
6 performance,” both before and at trial, and must be highly deferential to the
7 attorney’s judgments. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1347–48
8 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 688–89). In fact, there exists a
9 “strong presumption that counsel ‘rendered adequate assistance and made all
10 significant decisions in the exercise of reasonable professional judgment.’” *Id.*
11 (citation omitted).

12 If the petitioner satisfies the first prong, he must then establish that there is
13 “a reasonable probability that, but for counsel’s unprofessional errors, the result of
14 the proceeding would have been different. A reasonable probability is a
15 probability sufficient to undermine confidence in the outcome.” *Quintero-*
16 *Barraza*, 78 F.3d at 1347 (quoting *Strickland*, 466 U.S. at 694).

17 Petitioner identifies four instances where he contends counsel was
18 ineffective in violation of his Sixth Amendment right. Each will be addressed in
19 the order raised. ECF No. 262 at 2 (incorporating the issues raised in the
20 attachment at ECF No. 262-1).

ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 4

1 **A. Whether counsel was ineffective for not moving to dismiss the**
2 **Indictment for allegedly false testimony before the grand jury.**

3 Petitioner contends DEA Special Agent Savage testified falsely before the
4 grand jury in order to establish probable cause for the Indictment. Petitioner
5 contends that Officer Savage's testimony using the collective pronoun "we" was
6 false. Agent Savage testified:

7 Q: Then the next day, July 25th, there was a State search warrant
8 that was executed at Mr. Fuentes' residence in Sunnyside?

9 A: That is correct.

10 Q: Did Mr. Fuentes give any statements at that time?

11 A: Yes, he did.

12 Q: And can you tell us generally what those were?

13 A: We inquired of Mr. Fuentes how often he went to Spokane. He
14 said he had been there once the week prior. We asked him what the
15 date was, and he had indicated that it was on July 18th.

16 We asked him what his purpose was for going up there. He
17 alluded to the fact that he had traveled there for the sale of
18 methamphetamine.

19 ECF No. 243-1 at 13-14. Petitioner denies making any admissions and observes
20 that Agent Savage was not present when Deputy Hause interrogated Petitioner.
The district court denied Petitioner's motion to suppress the statements he made to
law enforcement that day. ECF No. 133.

ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 5

1 Agent Savage did not testify that he questioned or witnessed the
2 interrogation of Petitioner. Agent Savage testified at the grand jury proceeding as
3 a summary witness, he explained his answers by using the collective pronoun “we”
4 while referencing law enforcement without identifying specifically who asked
5 Petitioner the questions or who heard the answers. ECF No. 243-1 at 13-14.
6 Despite Petitioner’s complaint that hearsay was offered, hearsay statements are
7 admissible at the grand jury stage of the proceeding. Fed. R. Evid. 1101(d)(2);
8 *United States v. Bergeson*, 425 F.3d 1221, 1226 (9th Cir. 2005) (“All a federal
9 grand jury needs to indict is “probable cause,” and it can indict based on hearsay.”
10 (citations omitted); *see also United States v. Castillo*, 350 U.S. 359, 363-64 (1956).

11 Petitioner has not shown any aspect of Agent Savage’s testimony to be
12 false. At trial, Deputy Hause testified that he questioned Petitioner when he was
13 arrested on July 25, 2013 and that he admitted that on July 18, 2013 “he delivered
14 a pound of methamphetamine to Henry Bevans” in Spokane. ECF No. 218 at 73-
15 75. Agent Hause testified that the confession was documented in the charging
16 affidavit, not in his report prepared several days later. ECF Nos. 218 at 103; 243-3
17 at 4 (charging affidavit); *see also* federal affidavit in support of federal complaint,
18 ECF No. 5 at 6.

19
20
ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 6

1 Accordingly, the failure of counsel to seek dismissal of the Indictment was
2 not objectively unreasonable nor did it prejudice Petitioner as the trial jury
3 considered the admissible evidence and also found him guilty.

4 **B. Whether counsel was ineffective for failing to move to dismiss for a**
5 **fatal variance between the Indictment and proof at trial.**

6 First, Petitioner contends that he was charged with “distributing”
7 methamphetamine but the jury instructions (ECF No. 231 at 20 (Instruction No.
8 19)) allowed the jury to convict based on “transferring possession” of
9 methamphetamine. ECF No. 262-1 at 8. Those concepts are identical, there is no
10 fatal variance by accurately defining the term distributing.

11 Next, Petitioner contends the Government changed its theory of the case
12 when it received an aiding and abetting instruction. ECF Nos. 262 at 8-9; ECF No.
13 231 at 21 (Instruction No. 20). Aiding and abetting is implied in every federal
14 indictment for a substantive offense. *United States v. Armstrong*, 909 F.2d 1238,
15 1241 (9th Cir. 1990). Since it is implied in every substantive offense, there can be
16 no fatal variance between the Indictment and proof at trial. *See id.* at 1245. As the
17 jury was instructed in this case: “The evidence must show beyond a reasonable
18 doubt that the Defendant acted with the knowledge and intention of helping that
19 person commit the crime of distributing methamphetamine.” ECF No. 231 at 21.
20 *See also Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (To aid and abet

1 a crime, a defendant must not just “in some sort associate himself with the
2 venture,” but also “participate in it as in something that he wishes to bring about”
3 and “seek by his action to make it succeed.”) (citation omitted).

4 Accordingly, the failure of counsel to seek dismissal for a variance was not
5 objectively unreasonable nor did it prejudice Petitioner because the motion would
6 not succeed.

7 **C. Whether counsel was ineffective for failing to object to Deputy**
8 **Hause’s testimony about Petitioner’s admissions.**

9 Petitioner claims his attorney was ineffective for failing to object to Deputy
10 Hause’s testimony that Petitioner admitted to distributing a pound of
11 methamphetamine on July 18, 2013. Deputy Hause testified at the suppression
12 hearing that he did not ask Petitioner about the July 18, 2013 distribution of
13 methamphetamine. ECF No. 138 at 48. At trial, Deputy Hause testified that he
14 had in fact asked Petitioner if he delivered to Mr. Bevans and Petitioner admitted
15 on that date he delivered a pound of methamphetamine to Henry Bevans. ECF No.
16 218 at 73. Petitioner correctly observes that the case depended on whether the jury
17 believed Deputy Hause’s testimony that Petitioner admitted distributing a pound of
18 methamphetamine on July 18, 2013. Petitioner maintains that he did not answer
19 questions about drugs, but as was his right, he did not testify at trial.

1 Deputy Hause made a classic prior inconsistent statement. Petitioner's
2 counsel could have objected, but the Court would have overruled the objection.
3 Under the Rules of Evidence, Counsel's only alternative was to impeach the
4 witness with his prior statement. That is precisely what occurred here. ECF No.
5 218 at 102-03. Counsel effectively showed to the jury that Deputy Hause did not
6 record Petitioner's admission in his report and further previously testified in court
7 that he never questioned Petitioner about the July 18th incident. However, Deputy
8 Hause explained that he had made a mistake saying that and also testified that the
9 admission was in fact written in the charging affidavit. *See* ECF No. 243-3 at 4
10 (charging affidavit); *see also* federal affidavit in support of federal complaint, ECF
11 No. 5 at 6.

12 Accordingly, the failure of counsel to object to Deputy Hause's testimony
13 had no bearing on the issue; counsel exhausted the only avenue available when a
14 witness testifies inconsistently, impeachment by confronting the witness with his
15 inconsistencies in front of the jury. The jury then determines the credibility of the
16 witness while deciding the case.

17 **D. Whether counsel was ineffective for failing to challenge the search**
18 **warrant which allegedly was not supported by probable cause.**

19 Petitioner contends his counsel was ineffective for failing to file a
20 suppression motion concerning the search warrant executed at his home. He

1 argues that the warrant lacks probable cause and is overbroad. Additionally, he
2 argues that if counsel had successfully suppressed the warrant, his statements
3 would also be suppressed as fruit of the illegality. ECF No. 262-1 at 15-17.

4 An affidavit in support of a search warrant demonstrates probable cause if,
5 under the totality of the circumstances, it reveals a fair probability that contraband
6 or evidence of a crime will be found in a particular place. *United States v.*
7 *Celestine*, 324 F.3d 1095, 1102 (9th Cir. 2003) (citing *Illinois v. Gates*, 462 U.S.
8 213, 238 (1983)). “The task of the issuing magistrate is simply to make a practical,
9 common-sense decision whether, given all the circumstances set forth in the
10 affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons
11 supplying hearsay information, there is a fair probability that contraband or
12 evidence of a crime will be found in a particular place.” *United States v. Stanert*,
13 762 F.2d 775, 778–79 (9th Cir.), amended, 769 F.2d 1410 (9th Cir. 1985) (quoting
14 *Gates*, 462 U.S. at 238). A court must uphold a warrant if, “under the totality of
15 the circumstances, the magistrate had a substantial basis for concluding that
16 probable cause existed.” *Celestine*, 324 F.3d at 1102.

17 To determine specificity, [the court] examine[s] both the warrant’s breadth
18 and particularity. *United States v. Wong*, 334 F.3d 831, 836 (9th Cir. 2003)
19 (citation omitted). [Courts] consider one or more of the following to determine
20 specificity: (1) whether there was probable cause to seize particular items in the

ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 10

1 warrant, (2) whether the warrant sets out objective standards by which executing
2 officers can determine which items are subject to seizure, and (3) whether the
3 government could have described the items more particularly when the warrant
4 was issued. *Wong*, 334 F.3d at 836–37.

5 “Where defense counsel’s failure to litigate a Fourth Amendment claim
6 competently is the principal allegation of ineffectiveness, the defendant must also
7 prove that his Fourth Amendment claim is meritorious and that there is a
8 reasonable probability that the verdict would have been different absent the
9 excludable evidence in order to demonstrate actual prejudice.” *Kimmelman v.*
10 *Morrison*, 477 U.S. 365, 375 (1986).

11 Here, nothing was seized from Petitioner’s home that was introduced at his
12 trial. Thus, there can be no prejudice—no different result of this proceeding—had
13 counsel filed a suppression motion. Petitioner claims the ammunition seized was
14 used in another prosecution, but that is not this case. Defendant pleaded guilty to
15 being an illegal alien in possession of ammunition in case number 1:14-CR-2071-
16 TOR, not here.

17 Moreover, the totality of the circumstances set forth in the affidavit show
18 that the magistrate had a substantial basis for concluding that probable cause
19 existed. ECF No. 243-7. The specificity of the items to be seized were tied to
20 methamphetamine drug trafficking proceeds, implements and tools of the trade.

ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 11

1 Petitioner was arrested by state authorities at the scene, despite that no drug
2 trafficking evidence relevant to the delivery of methamphetamine charge was then
3 located. It cannot be said that Petitioner's statements were solely the product of
4 the July 25, 2013 execution of the search warrant, but rather were the product of
5 his arrest for the July 18, 2013, delivery of methamphetamine in Spokane. ECF
6 No. 243-3. Thus, even if the search warrant were suppressed, Petitioner has not
7 shown that the result of the proceeding would have been different.

8 **IV. Certificate of Appealability**

9 A petitioner seeking post-conviction relief may appeal a district court's
10 dismissal of the court's final order in a proceeding under 28 U.S.C. § 2255 only
11 after obtaining a certificate of appealability ("COA") from a district or circuit
12 judge. 28 U.S.C. § 2253(c)(1)(B). A COA may issue only where the applicant has
13 made "a substantial showing of the denial of a constitutional right." See *id.*
14 § 2253(c)(2). To satisfy this standard, the applicant must "show that reasonable
15 jurists could debate whether (or, for that matter, agree that) the petition should
16 have been resolved in a different manner or that the issues presented were adequate
17 to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S.
18 322, 336 (2003) (internal quotation marks and citation omitted).

19 This Court concludes that Defendant is not entitled to a COA because he has
20 not demonstrated that jurists of reason could disagree with the Court's resolution

ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 12

1 of his constitutional claims or conclude the issues presented deserve
2 encouragement to proceed further.

3 **ACCORDINGLY, IT IS ORDERED:**

4 1. Petitioner's Renew[ed] Motion Post-Remand for Habeas Corpus Pursuant to
5 28 U.S.C. § 2255 and to Appoint Counsel (ECF No. 262) is **DENIED**.

6 2. Petitioner's Motion To Either Set a Briefing Schedule or For Sua Sponte
7 Ruling on Petitioner's Renew[ed] Motion Post-Remand for Habeas Corpus
8 Pursuant to 28 U.S.C. § 2255 and to Appoint Counsel (ECF No. 265) is
9 **DENIED**.

10 3. The Court further certifies that there is no basis upon which to issue a
11 certificate of appealability. 28 U.S.C. § 2253(c); Rule 11, Rules—Section
12 2255 Proceedings. A certificate of appealability is **DENIED**.

13 The District Court Executive is directed to enter this Order and provide
14 copies to the parties and **CLOSE** this file, and the corresponding civil file.

15 **DATED** May 3, 2018.



Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

ORDER DENYING POST-REMAND

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. § 2255 ~ 13